Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION ON FURTHER NOTICE OF PROPOSED RULEMAKING

BellSouth Corporation, for itself and its affiliated companies ("BellSouth"), hereby submits this Reply to comments filed in response to the Commission's *Further Notice of Proposed Rulemaking* in the above referenced proceeding.[1]

As shown more fully below, there is widespread concurrence that the Commission should drop its proposals to adopt more regulations in this proceeding. First, commenting parties overwhelmingly agreed with BellSouth that the Commission need not and should not adopt additional regulations to create in customers a right under Section 222(c)(1)[2] of the Act[3] to deny

---

[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-115, CC Docket No. 96-149, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27 (rel. Feb. 26, 1998) ("*Order*" or "*Further Notice*" as context dictates).

[2] 47 U.S.C. § 222 (c)(1).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("The Act").

carriers all marketing use of customer proprietary network information ("CPNI"). Second, the majority of commenters also agreed that the Commission need not and should not adopt new regulations to implement or enforce Sections 222(a)[4] and 222(b).[5] As even the most ardent of the advocates of additional regulations under these latter sections concedes, the provisions of these sections are "remarkably clear and direct." Additional Commission regulation is not necessary to achieve carrier compliance with what Congress has already decreed. Accordingly, no new regulations should be adopted.

I. The Commission Should Not Create a Right in Customers to Deny Carriers All Marketing Use of CPNI

Almost unanimously, commenting parties opposed (or offered no support for) the notion of creating in customers a right to deny carriers the use of CPNI to market services within the scope of the customer's existing service relationship. The reasons given in opposition were as plentiful as the number of parties addressing the issue. Conversely, one lone commenter supported the Commission's proposal, but on grounds that are not sustainable. Accordingly, the Commission should drop its proposal of additional regulations under Section 222(c)(1).

Reasons advanced in opposition to the Commission's proposal were based on both legal and policy principles. Without restating all these reasons in their entirety, BellSouth summarizes many of them below:

- Congressionally-crafted balance between carrier and customer interests would be upset by proposed action;[6] statute confers right upon carriers

---

4 47 U.S.C. § 222(a).

5 47 U.S.C. § 222(b).

6 U S West Comments at 3; MCI Comments at 4-6; Sprint Comments at 2; Intermedia Comments at 3-4; Vanguard Comments at 3.

to use CPNI within total service relationship;[7] no Congressional suggestion that proposed right exists in customers[8]

- Commission already recognized Congress did not intend to "restrict use of CPNI for marketing purposes altogether"[9]
- general statutory duty of confidentiality under Section 222(a) does not override specific carrier authority to use CPNI under Section 222(c)(1)[10]
- proposal raises First[11] and Fifth[12] Amendment concerns
- customer expectation is that carriers will use CPNI within the existing relationship[13]
- new rules would do little to protect against unwanted marketing;[14] indeed, could lead to greater telemarketing and other solicitations[15]
- proposal would create additional marketing expense, with no attendant benefit[16] and would foster customer confusion and frustration[17]
- existing alternatives are available, *e.g.*, do not call/mail/solicit lists[18]
- competitive marketplace will drive appropriate carrier behavior[19]
- no evidence of past misbehavior to be redressed[20]

---

7 SBC Comments at 4; Sprint Comments at 2.

8 SBC Comments at 2; US West Comments at 2; AT&T Comments at 5; MCI Comments at 3; Sprint Spectrum Comments at 2; Vanguard Comments at 4; USTA Comments at 2-3.

9 SBC Comments at 4 (citing *Order* at ¶ 37); Intermedia Comments at 3 (citing same).

10 AT&T Comments at 5; MCI Comments at 3; Omnipoint Comments at 3; Sprint Spectrum Comments at 2-3.

11 USTA Comments at 3-4.

12 Vanguard Comments at 6.

13 SBC Comments at 5; US West Comments at 3; *cf.* Vanguard Comments at 5 ("proposal would extinguish the value of the relationship with the customer").

14 Bell Atlantic Comments at 2 (*e.g.*, use of non-CPNI or non-target marketing); BellSouth Comments at 3-4.

15 BellSouth Comments at 3-4; MCI Comments at 4.

16 Bell Atlantic Comments at 2; Intermedia Comments at 6.

17 BellSouth Comments at 3; Bell Atlantic Comments at 2; Vanguard Comments at 5.

18 BellSouth Comments at 3; Bell Atlantic Comments at 3; GTE Comments at 2-3; SBC Comments at 6; US West Comments at 4; AT&T Comments at 2; MCI Comments at 4; Sprint Comments at 5.

19 GTE Comments at 3; AT&T Comments at 2.

20 GTE Comments at 3; US West Comments at 8; AT&T Comments at 2.

In contrast with this consensus opposition to the Commission's proposal, only one party, the Consumers' Utility Counsel Division of the (Georgia) Governor's Office of Consumer Affairs ("CUCD"), advocated a right of customers to restrict all marketing use of CPNI by carriers. The only argument CUCD offered to support its position, however, is that "*it has always been assumed that customers have the right to refuse the use of CPNI for marketing purposes generally.*"[21] CUCD offers no basis for this assertion, nor is it even correct, given that until the Act was passed, none but a handful of carriers were subject to any form of CPNI restrictions. Under this circumstance, the assumption posited by CUCD cannot be read into the Act.

Moreover, as has been shown in other comments, CUCD's apparent concern with "telemarketing . . . intrusions" and "telemarketing abuses" would not be redressed even were the Commission's proposal adopted. To the contrary, the record reflects that a customer's direction not to use CPNI in marketing would not be likely to curtail telemarketing. Instead, customers might be even *more* likely to receive telemarketing "cold calls" by their own carriers if carriers were unable to be more selective in who they call by using CPNI. The better solution to CUCD's concern is one that is already available to customers under the TCPA[22] and the Commission's associated rules.[23]

---

[21] CUCD Comments at 4 (emphasis in original).

[22] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992).

[23] 47 C.F.R. § 64.1200(e)(2)(iii), (vi).

Finally, to the extent CUCD attempts to invoke customer "ownership" of CPNI as a basis for the right CUCD asserts,[24] the Commission should take this opportunity to clarify that the gratuitous language from the *Order* quoted by CUCD -- "to the extent CPNI is property, 'it is better understood as belonging to the customer, not the carrier'"[25] -- was, at best, mere dicta and was not a binding holding resolving any allocation of property rights. Indeed, elsewhere in the *Order*, the Commission expressly acknowledged that CPNI is "commercially valuable" to carriers,[26] that carriers consider CPNI to be important "asset of their business,"[27] and that carriers "will protect against unaffiliated entries acquiring access to *their* customer information."[28] Under this circumstance, there is no established customer ownership right upon which can be built any right to deny carriers all marketing use of their own business assets.

In light of the overwhelming and convincing opposition to the Commission's proposal and only minimal (and unsustainable) support for it, the Commission should not adopt regulations creating a right for customers to deny carriers all marketing use of CPNI.[29]

---

24 CUCD Comments at 5.

25 *Id.*, quoting *Order* at ¶ 43.

26 *Order* at ¶ 2.

27 *Order* at ¶ 22.

28 *Order* at ¶ 196 (emphasis added).

29 Although Omnipoint opposes the Commission's proposal, it suggests that should the Commission nonetheless adopt new rules, "CMRS providers who provide integrated service" should be exempt from them. Omnipoint Comments at 2. The Commission has already concluded that Section 222 applies evenly to all carriers, *Order* at ¶ 3, so Omnipoint's alternative contention should be summarily dismissed. Omnipoint's comments do reveal, however, another apparent misperception it holds about the *Order*. Omnipoint appears to suggest that because it bundles information services with its telecommunications services in its pricing and on customer bills, that the information service component is within the customer's "total service relationship" and that CPNI from the telecommunications component may be used, absent affirmative approval, to sell the information services component. Omnipoint Comments at 4-5. Although

II. The Commission Should Not Adopt Additional Regulations to Implement Sections 222(a) or 222(b)

The Commission's proposal for additional regulations under Sections 222 (a) and 222(b) received mixed reviews. Significantly, however, those advocating adoption of new rules were unable to articulate any benefit that such rules would offer over and above the obligations that are already clearly set forth in the Act or that carriers otherwise may negotiate between themselves. Where statutory language is so clear, the Commission should refrain from engaging in needless regulation.

That regulations under Section 222(a) and (b) are not needed is confirmed by TRA's candid admission that the provisions of those sections are "remarkably clear and direct."[30] Moreover, these provisions already "contain the provisions long sought by resale carriers."[31] In light of this "long sought," "clear and direct" response by Congress to the needs of resale carriers, the Commission should be extremely circumspect not to succumb to TRA's schizophrenic request that the Commission nonetheless adopt "implementing regulations."[32]

Moreover, as several parties noted, carriers are sophisticated businesses who routinely enter into commercial relationships that require the handling and protection of confidential

---

Omnipoint has touched upon an issue that might be appropriate for a petition for reconsideration, its description of its present arrangement would seem to place it squarely within the proscription of paragraph 47 of the *Order* and, at a minimum, provides no basis for special treatment under rules that might be adopted in this further rulemaking.

30 TRA Comments at *iii*.

31 *Id.* at *ii*.

32 TRA contends that these "long sought" provisions are "meaningless" if they are not "enforceable and enforced." TRA Comments at 8. TRA has offered no reason, however, why an Act of Congress would not be "enforceable" or "enforced" absent an additional layer of federal regulations. Plainly put, the Commission does not need to adopt its own rules to "put teeth" into statutory obligations.

information of one another and of others. These sophisticated parties can be expected to have and to use their expertise in negotiating confidentiality obligations that are appropriate for a given relationship.[33] Indeed, as MCI points out, "[n]othing in Section 222 appears to limit carriers' abilities to voluntarily provide greater, or accept less, protection for [carrier proprietary] information pursuant to contract than that afforded by Section 222(a) and (b)."[34]

The need for flexibility in allocating rights and obligations associated with confidential or proprietary information in a given relationship is particularly acute in light of US West's observation that in many instances a relationship between two carriers will lead to development of *jointly proprietary* information.[35] Moreover, because both carriers have legitimate claims to the jointly proprietary information, the Commission should not adopt rules that may inadvertently impose undue limitations on either carrier's lawful use of that information. For similar reasons, the Commission should not by rulemaking issue a "declaration" that any specific "type" of information is or is not to be treated for all purposes as confidential or proprietary information of another carrier.[36]

Nor is there a need for additional "safeguard" requirements or special enforcement provisions. But, if the Commission does adopt any requirements, it should ensure they are directed at the appropriate suspects. As CUCD observes, "the most immediate threat to

---

33 *See especially* MCI Comments at 16 ("Businesses are used to having to safeguard others' confidential information, including competitors' information, and almost all of the relationships that cause carrier proprietary information to be provided to other carriers, such as resale, are governed by contracts that contain strict confidentiality provisions.").

34 *Id.* at n. 6.

35 U S West Comments at 7-10.

36 MCI Comments at 6-7; Sprint Comments at 7-8.

consumers will come from unauthorized or fraudulent business practices" such as "unauthorized roaming through customer records" by so-called competitive LECs (CLECs).[37] Thus, it is not *ILEC* misuse of information in winback programs with which the Commission should be concerned, as Intermedia suggests.[38] Rather, the Commission should be most vigilant to deter and punish *CLEC* attempts to misappropriate information to gain customers, whether initially or through winback programs.[39]

Finally, parties generally concurred that ISPs should not be extended the rights of carriers under Sections 222(a) and 222(b).[40] AICC, however, attempts to use language of the *Further Notice* that suggested inclusion of ISPs within the Commission's proposal as a vehicle for advancing additional special rules to address the overlap between Section 275(d)[41] and Section 222. Specifically, AICC asks that the Commission require LECs to deny access to customers' call detail information by personnel who may sell alarm services.[42] AICC's proposal of specific access restrictions should be rejected.

---

37 CUCD Comments at 7.

38 Intermedia Comments at 9.

39 Indeed, the Commission's experience with "slamming," to which Intermedia compares winback programs, reveals that the overwhelming majority of slamming offenses have been alleged against resellers and other niche players. *Common Carrier Scorecard* (Enforcement and Industry Analysis Divisions, Common Carrier Bureau, Federal Communications Commission, December 1997) at 24. [Available http://www.fcc.gov/bureaus/common carrier/reports/scorecard97.html].

40 BellSouth Comments at 5; USTA Comments at 4-5; GTE Comments at 5-6.

41 47 U.S.C. § 275(d). This section prohibits LECs from using the "occurrence or content" of calls to alarm monitoring providers to market alarm monitoring services. *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, 11 FCC Rcd 9553, 9557 (1996).

42 AICC Comments at 1-2.

First, AICC concedes that the applicable statutory constraints are *use* restrictions, not access restrictions.[43] Additionally, AICC's proposal is grossly overbroad, in any event. The proposal would deny access to all call detail information of all customers by any service representative authorized to sell alarm services, even if any given customer does not subscribe to alarm monitoring service from any provider. Moreover, AICC is mistaken in its apparent belief that a service representative would even be able to routinely discern from call detail any information that would prompt an alarm monitoring sales proposal.[44] Given this practical inability of a service representative to use information that may not be in a customer's record in any event, an access restriction of the type proposed by AICC makes no sense and should be rejected.

CONCLUSION

No additional regulations are necessary under Section 222. Customer privacy interests with respect to carriers' use of CPNI for marketing additional services within the scope of an existing service relationship are already adequately protected by the Commission's "do not call"

---

[43] AICC Comments at 5 ("In instances where CPNI contains alarm monitoring data, a LEC's *use* of such information must comply with both Section 275(d) and Section 222.") (emphasis added).

[44] To meet AICC's perception, a service representative sitting in a centralized operations center serving a large geographic area would have to know the phone numbers of all the alarm monitoring providers in that area and would have to identify from the call detail of the hundreds of customer records viewed daily that a particular customer had called any of those numbers and was thus a potential alarm service candidate. The reality is that service representatives do not have the luxury of time simply to scroll through customers' call detail records to search for alarm monitoring related information, nor would they recognize it if they saw it. To the extent AICC may be concerned that call detail information might be culled from customer records to form a list for targeted outbound marketing of alarm services, the supervisory review process established in the *Order* to prevent other inappropriate *uses* of CPNI for outbound marketing activities, Order at ¶ 200, would serve that same purpose with respect to alarm monitoring related CPNI.

requirements. Sections 222(a) and 222(b) are "remarkably clear and direct" and need no explication. For the reasons presented herein and in its Comments, BellSouth urges the Commission not to adopt further regulations in this proceeding.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

M. Robert Sutherland
A. Kirven Gilbert III

Its Attorneys

1155 Peachtree Street, N.E.
Suite 1700
Atlanta, Georgia 30309
(404) 249-3388

Date: April 14, 1998

CERTIFICATE OF SERVICE

I do hereby certify that I have this 14th day of April, 1998, served all parties to this action with a copy of the foregoing **REPLY COMMENTS** by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed below:

Denise W. Tuttle

Distribution List
CC Docket 96-115

Office of the Secretary*
Federal Communications Commission
1919 M Street, N.W., Room 222
Stop Code 1170
Washington, D.C. 20554

International Transcription Services, Inc.*
1231 20th Street, N.W.
Washington, D.C. 20036

Janice Myles*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, Room 544
Washington, D.C. 20554

Michael S. Pabian
Counsel for Ameritech
Room 4H822
2000 West Ameritech Center Drive
Hoffman Estates, Illinois 60196-1025

Lawrence W. Katz
Attorney for Bell Atlantic Telephone Companies
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Washington, D.C. 20036

Robert M. Lynch
SBC Communications Inc.
One Bell Center, Room 3532
St. Louis, Missouri 63101

Kathryn Marie Krause
US West, Inc.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Judy Sello
AT&T Corp.
Room 3245I1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Frank W. Krogh
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Michael B. Fingerhut
Sprint Corporation
1850 M Street, N.W., 11th Floor
Washington, D.C. 20036

Jonathan E. Canis
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

James M. Talens
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mark J. O'Connor
Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036

Elizabeth H. McJimsey
Attorney for Sprint Spectrum L.P.
d/b/a Sprint PCS
4900 Main Street, 12th Floor
Kansas City, Missouri 64112

Kelli J. Jareaux
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

Charles C. Hunter
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005-2164

Jim Hurt, Director
Office of Consumer Affairs
Consumers' Utility Counsel Division
#2 Dr. M.L. King, Jr. Drive
Plaza Level, East Tower
Atlanta, Georgia 30334

Mary Mack Adu
Public Utilities Commission
State of California
505 Van Ness Avenue
San Francisco, California 94102

Steven A. Augustino
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

* By Hand Delivery